TOH MING JEE

v.

LAU YIIK UNG

HIGH COURT, SIBU
TUAN STEVE L.K. SHIM J.
[CIVIL SUIT NO. 198 OF 1979]
28 JANUARY 1994

TORT: Negligence - Road accident - Collision from opposite directions between two motorcycles - Defendant straying into plaintiff's path - Plaintiff's evidence corroborated - Defendant's evidence uncorroborated - Section 114(g) Evidence Act 1950 - Loss of vision in right eye - Damages - Quantum.

This case emanated from a collision between two motorcycles, whereby the plaintiff claimed general damages, interest and costs for loss of vision in the right eye, as well as reduced prospects of marriage.

The plaintiff contended that the accident was caused by the negligence and recklessness of the defendant in riding,managing and controlling his motorcycle at the material time. The plaintiff claimed that the oncoming motorcycle was approaching at a slow pace while in the process of encroaching into the plaintiff's path and was carrying a pile of election posters as well as a pillion-rider.

On the contrary, the defendant, while alleging negligence on the part of the plaintiff, denied that he strayed into the plaintiff's path or that he was negligent or reckless stating that the accident occurred after he had avoided two children on his side of the road.

The plaintiff's testimony was corroborated by his pillion-rider, while the defendant failed to get his pillion-rider to testify in Court.

Held:

[1] The Court found that the testimony of the plaintiff was most probable and nearer to truth. The defendant was guilty of negligence by wrongfully encroaching onto the other side of the road and in failing to manage or control his motorcycle so as to avoid the collision.

[2] Although the defendant was substantially to be blamed for the accident, there had been contributory negligence on the part of the plaintiff. From the sketch exhibit P2 drawn by the plaintiff it seems that he had just negotiated a bend when the collision took place. The plaintiff was travelling a trifle too fast in negotiating the bend. If he had slowed down as he should have done, it might have been possible for him to take the necessary evasive action and avoid hitting the defendant. In the circumstances the defendant was liable to the proportion of 80%, as against 20% on the part of the plaintiff.

[3] The general damages awarded on the basis of 100 per cent liability was RM75,000. As the liability of the defendant was 80% the amount of general damages awarded to the plaintiff was RM60,000 with interest at 8% per annum from judgment until realisation

[Judgment for the plaintiff in the sum of RM60,000 with interest and three quarters of taxed costs.].

Cases referred to:

Davis v. Swan Motor Co. (Swansea) Ltd. [1949] 2 KB 291 ***(refd)***

Nance v. British Columbia Electric Railway Co. Ltd. [1951] 2 All ER 448 ***(refd)***

Swadling v. Cooper [1931] ACI ***(foll)***

Ng Moon Leong v. Seema Balvantrai [1986] 2 MLJ 304 ***(refd)***

Re Campbell

Legislation referred to:

Evidence Act 1950, ss. 32(1)(b) and 73A, 114(g)

For the plaintiff - Lawrence Ngu; M/s. David Teng & Co.

For the defendant - Allan Lau; M/s. Chong Brothers

JUDGMENT

Steve L.K. Shim J:

This case involves an accident between a motorcycle SA 6489 ridden by the plaintiff and a motorcycle 6D 927 ridden by the defendant. The accident took place at Repok Road about 3 miles from the town of Sarikei on 2 July 1978. The plaintiff is claiming general damages, interest and cost having abandoned his claim for special damages and loss of income arising from the accident.

It is plaintiff's case that the accident was caused as a result of the defendant's negligence and recklessness in riding, managing and controlling his motorcycle at the material time and place. The plaintiff has testified in effect that at about 10.00 a.m. on that fateful day, he was

riding on his motorcycle SA 6489 along Repok Road heading towards the town of Sarikei with a pillion-rider, one Goh Hock Ley; that as he was approaching the town of Sarikei, and while travelling on his side of the road (the left side), he saw an oncoming motorcyclist encroaching onto his path by travelling to the left and then to the right; that as a result, there was insufficient time and space for him to go through thereby resulting in a collision causing him to hit his right eye against the handle of his motor-cycle and rendering him unconscious. In the course of his testimony, the plaintiff has drawn out a sketch exhibit P2 in an attempt to better explain his version of the accident. The plaintiff has also testified that the other motorcyclist was travelling slowly in the process of encroaching onto his path and that he was carrying a pile of election posters as well as a pillion-rider. He maintains that he was travelling at the speed of slightly more than 50 kph at the material time. The plaintiff's story is substantially corroborated by his pillion-rider Goh Hock Ley PW5.

The defendent, in his statement of defence, has denied any negligence and or recklessness on his part. Alternatively, he contends that the said accident was caused wholly or in part by the negligence of the plaintiff and on that basis, he has counterclaimed for damages and costs. The defendant has testified that he did not encroach onto the other side of the road as alleged by the plaintiff nor had he at any time crossed the middle of the road. According to him, he was then travelling at about 10 kph and that the accident occurred after he had avoided or was in the process of avoiding two children who were apparently on his side of the road.

Quite obviously, there are two conflicting versions as to how the accident occurred. Whether one version is more probable than the other therefore requires some analysis of the evidence adduced. In this respect, a number of salient features are clearly discernible.

First, the plaintiff's story is substantially corroborated by his pillion-rider Goh Hock Ley PW5. The defendant however has not called his pillion-rider one Lau Yik Chai. When asked why this person has not been called, the defendant says that he is unable to get his address nor is he able to locate him through his parents. I find this difficult to accept because since the commencement of this action in 1979, more than a dozen years have elapsed and if the defendant had really taken efforts to locate Lau Yik Chai that he would have been able to do so. It is quite conceivable, I think, that this Lau Yik Chai would have visited his parents at some time or another on festive occasions and since the defendant has admitted that he visited Lau's father (who is his uncle) nearly everyday, there would be no reason why he should fail to meet up with Lau and request him to be a witness in this case. I do not accept that the defendant has made any genuine attempt to locate Lau Yik Chai, who, by reason of the fact that he was a pillion-rider of the defendant, would have been a very material witness to the accident. As the defendant has failed to call him, the presumption under s. 114(g) of the Evidence Act applies.

Secondly, the defendant in his testimony has alleged that there were 2 children on his side of the road and that the accident occurred after he had apparently avoided knocking into them. He seems to have placed some emphasis on this allegation, yet it is strange that he has not pleaded it in his statement of defence. No explanation has been advanced for this omission. Such failure to plead must therefore militate against the credibility of the defendant and hence the truthfulness of his allegation.

Thirdly, there is evidence that as a result of the collision, both the plaintiff and the defendant were knocked unconscious. However, Goh Hock Ley PW5, the plaintiff's pillion-rider was conscious after the accident although he was hurt in the leg. According to him, the two motorcycles involved were found lying on the plaintiff's side of the road after the accident. In the absence of any contrary evidence, I am quite prepared to accept his evidence on this matter. If therefore the 2 vehicles were on the plaintiff's side of the road after the accident, then this must strongly suggest that the collision took place on his side of the road. There is no indication that it was raining at the time or that the road was wet and slippery so that the said vehicles would have skidded upon impact.

And fourthly, the defendant has testified in effect that he was doing campaigning work; that he was carrying a pile of election posters at the material time and was assigned to affix them onto the trees which could be found on both sides of the road. It is I think reasonable to assume or expect the defendant to move from one side of the road to the other in the process of affixing the election posters onto the trees along the said

road. If so, it is therefore quite conceivable that he would have gone into the plaintiff's side of the road at the material time in order to affix the said posters onto the trees along that side of the road.

On the evidence, facts and for the reasons given, I find that the version given by the plaintiff to be the most probable and nearer to the truth. In my judgment, the defendant is guilty of negligence by wrongfully encroaching onto the other side of the road and or in failing to manage or control his motorcycle so as to avoid the collision with the plaintiff who was then travelling on his side of the road.

Notwithstanding the finding of negligence on the part of the defendant, there is still the question of whether there has been contributory negligence on the part of the plaintiff. This has been specifically pleaded by the defendant. Now, this question was canvassed by *Buckhill L.J. in Davis v. Swan Motor Co. (Swansea) Ltd.* [1949] 2KB 291 in the following terms:

> ... When one is considering the question of contributory negligence, it is not necessary that negligence constituted a breach of duty to the defendant. It is sufficient to show lack of reasonable care by the plaintiff for his own safety.

And the concept of contributory negligence was examined and clarified by the Privy Council in *Nance vs. British Columbia Electric Railway Co. Ltd.* [1951] 2 All ER. 448 where the *Davis case* was considered and applied. I accept the proposition stated by Lord Hailsham in *Swadling vs. Cooper* [1931] ACI who said *inter alia*:

> Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence: the plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances.

In the light of the dicta aforesaid, what then is the position in the present case? Here, the plaintiff has admitted that he was travelling at more than 50 kph and that he did not slow down even after sighting the defendant's motor-cycle coming from the opposite direction and encroaching onto his side of the road. From the sketch exhibit P2 drawn by the plaintiff, it seems that he had just negotiated a bend when the collision took place. I think the plaintiff was travelling a trifle too fast in negotiating the bend. If he had slowed down, as he should have done, it might have been possible for him to take the necessary evasive action and avoid hitting or colliding against the defendant. In the circumstances, I find that there is contributory negligence on the part of the plaintiff.

Having regard to the facts, evidence and circumstances, I find the defendant substantially to blame for the accident. He is liable in the proportion of 80% as against 20% on the part of the plaintiff.

I come now to the quantum of damages. As I have already stated, although the plaintiff has, in his statement of claim, prayed for *inter alia* special damages and loss of income arising from the accident, he has decided to abandon such claims but to claim specifically for general damages only.

The plaintiff has testified *inter alia* that he was rendered unconscious as a result of the collision; that he regained consciousness at the Sarikei hospital; that upon regaining consciousness, he was unable to see with both eyes and was only able to see with his left eye after a week in hospital; that because of the serious condition, he was then transferred to Lau King Howe hospital in Sibu where he was put under the charge of Dr. Menon, the opthalmologist; that after about 4 months of treatment, he was told that he had lost the sight of his right eye. He has further testified that later in 1989, while operating a boat (tongkang), he met with another accident, as a result of which, he lost his right leg. He attributed this in part to his poor eye sight and his inability to focus properly with the loss of his right eye. He also says that his defective right eye has adversely affected his marriage prospects possibly because of his unsightly appearance. Dr. Menon who examined him made out a medical report exhibit P3. Because of its brevity and for the sake of convenience, I shall reproduce it verbatim. It states as follows:

> He was referred from the Divisional Hospital, Sarikei on 4 July 1978 after a road traffic accident on 2 July 1978 and was admitted here on the surgical side.
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> He was referred to me on 7 July 1978 when my findings were as follows:
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> (1) Right Eye: Blind (no perception of light even).

Sutured wounds of upper lid and infraorbital of lids.
Restricted movements of the eye ball.
Edema of conjunctiva and subconjunctival haemorrhage.
Dilated and fixed pupil.
Normal optic disc.
Slight engorgement of retinal veins with retinal edema.

(2) Left Eye: Vision: 6/12 which gradually improved to 6/6.
Ecchymosis of lids and subconjunctival haemorrhage.
Fundus: Normal.

On 10 July 1978, left eye sight was normal (6/5) but the right eptic disc was pale.

He was discharged from the hospital on 14 July 1979.

When he attended my clinic on 2 August 1979 the right eye sight had improved to counting fingers at 1 metre; but subsequent check up on 6 October 1978, 19 June 1979 and 15 October 1979 revealed that he was blind in his right eye and so could not even count fingers with that eye. Moreover, the right optic nerve head showed definite evidence of atrophy and this eye looked slightly smaller.

X-ray of skull revealed that, besides other fractures, there was suspicious disorganisation of the right optic foremen. It was most likely that the right optic nerve was damaged at the level of the optic foremen resulting in blindness on that side.

It should be noted that Dr. Menon has not been cross-examined about his findings as the said report exhibit P3 has been admitted under ss. 32(1) (b) and 73A of the Evidence Act. Be that as it may, I accept the findings as contained in the said report. Then as recently as 22 December 1993, the plaintiff underwent further examination by another opthalmologist Dr Kang Aing Aing PW1 who confirmed that the plaintiff was completely blind in the right eye and that there was no prospect of restoration. She made out a report exhibit P1, the relevant parts of which state as follows:

Right eye:

A right divergent squint of 30 degrees is present. Extraocular eye movement is full. There is a scar at the lateral aspect of the right lower lid. There is mild enophthalmos. Visual acuity is perception of hand movements in the nasal half of visual field only. The temporal half field perceive light vaguely.

The right eye is white, cornea is clear, anterior chamber is quiet, and the lens is clear. There is no direct pupillary reaction to light, and an afferent pupillary defect, a sign of optic nerve dysfunction.

Intraocular pressure is 12 mmHg.

Examination of the fundus showed a white optic disc. The macula is normal. The retina is flat.

I am satisfied that Dr. Kang PW1 is an expert witness. She is an experienced and qualified eye specialist. Her testimony and her findings as to her examination of the plaintiff have not really been disputed by the defendant. In the circumstances, I accept her findings as contained in the report exhibit P1. It seems clear that the blindness in the right eye of the plaintiff is permanent. There is no possibility of any recovery.

Now, Counsel for the parties concerned have cited several cases on measure of damages as a guildeline. Of these, I think the case of *Ng Moon Leong vs. Seema Balvantrai* [1986] 2 MLJ 304 is perhaps more relevant. There, the Court awarded a sum of RM50,000 for general damages for the loss of the sight of the right eye, pain and suffering and loss of marriage prospects to a 10 year old Indian girl. The case is a Singapore case. Another case which has not been cited but which I think is also of some relevance is *Re Campbell* (1 September 1992. ClCB London) (reported in Kemp & Kemp: The Quantum of Damages) In that case, the plaintiff suffered permanent loss of the sight in the right eye and cosmetic deformity. She also suffered serious side effects such as a significant change in temperament, manifested in panic attacks, loss of confidence, sleeplessness and depression. She was also dismissed from her job as a designer because of her unsightly appearance and her social activities had to be curtailed. She had to give up squash, tennis and horse riding. The side effects were continuing. The Court awarded her 30,000 in general damages.

In the instant case, having regard to the very serious injuries sustained by the plaintiff and taking into consideration such factors as the cost of living, the value of the currency and other economic realities of the present time and mindful, of course, of the allegation by the defendant that he had sustained a minor injury on the

forehead, etc, I am of the view that a fair and adequate figure under general damages is RM75,000 on the basis of a 100% liability on the part of the defendant. However, as liability for the accident has been apportioned at 80% to the defendant and 20% to the plaintiff, the amount of general damages awarded to the plaintiff is RM60,000. This shall carry interest at the rate of 8% p.a. from date of judgment until final payment. The plaintiff shall be entitled to three-quarters of the taxed costs.

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